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SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From:
Securities and Exchange Commission
Office of FOIA Services
100 F Street, NE
Washington, DC 20549-2736

Extension: Exchange Act Rule 3a71-3

SEC File No. 270-655, OMB Control No. 3235-0717

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (“PRA”), the Securities and Exchange Commission (“Commission”) is soliciting comments on the existing collection of information provided for in Rule 3a71-3 (17 CFR 240.3a71-3) under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). The Commission plans to submit this existing collection of information to the Office of Management and Budget (“OMB”) for extension and approval.

Rule 3a71-3 is adopted and in effect, but the compliance date for Rule 3a71-3 has not yet passed. The representations contemplated by Rule 3a71-3 will be relied upon by counterparties to determine whether such transaction is a “transaction conducted through a foreign branch” of a counterparty, as defined in Rule 3a71-3(a)(3)(i), as well as to verify whether a security-based swap counterparty is a “U.S. person.” Counterparties to security-based swap transactions may voluntarily give such representations to one another to reduce operational costs and allow each party to ascertain whether such transaction is subject to certain Title VII requirements. Because any representations provided to counterparties under Rule 3a71-3 will constitute voluntary third-party disclosures, the Commission will not typically receive these disclosures.

The Commission believes that the representations contemplated by Rule 3a71-3 will, in most cases, be made through amendments to the parties' existing trading documentation (e.g., the schedule to a master agreement). The Commission believes that, because trading relationship documentation is established between two counterparties, whether a counterparty is able to represent that it is entering into a "transaction conducted through a foreign branch" or that it does not meet the criteria of the "U.S. person" definition will not change on a transaction-by-transaction basis and, therefore, such representations will generally be made in the schedule to a master agreement, rather than in individual confirmations. Because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that counterparties will be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships. The Commission believes that this standardized language may be developed by individual respondents or through a combination of trade associations and industry working groups.

a. Representations regarding a "transaction conducted through a foreign branch"

Pursuant to Rule 3a71-3, parties to security-based swaps are permitted to rely on certain representations from their counterparties when determining whether a transaction falls within the definition of a "transaction conducted through a foreign branch." The Commission staff estimates that a total of 50 entities will incur burdens under this collection of information, whether solely in connection with the business conduct requirements or also in connection with

the application of the de minimis exception. These estimates are based on our understanding of the over-the-counter (“OTC”) derivatives markets, including the size of the market, the number of counterparties that are active in the market, and how market participants currently structure security-based swap transactions.

The Commission estimates the one-time third-party disclosure burden associated with developing representations under this collection of information will be, for each U.S. bank counterparty that will make such representations, no more than five hours, and up to \$2,000 for the services of outside professionals, for an estimate of approximately 250 hours¹ or 83.33 hours² per year when annualized over three years, across all security-based swap counterparties that will make such representations.³ This estimate assumes little or no reliance on standardized disclosure language.

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission continues to believe that the ongoing third-party disclosure burden associated with this requirement will be 10 hours per U.S. bank counterparty for verifying representations with existing counterparties, for a total of approximately 500 hours⁴ across all applicable U.S. bank counterparties.⁵

¹ 50 (total number of entities) * 5 hours = 250 hours.

² 250 hours (total hours to develop representations) ÷ 3 years = 83.33 hours.

³ See Business Conduct Adopting Release at 30096.

⁴ 50 (total number of entities) * 10 hours = 500 hours.

The Commission believes that some of the entities that will have to comply with Rule 3a71-3 will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission assumes that all 50 respondents will seek outside counsel for the first year only and will, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also assumes that none of the 50 respondents will seek outside legal services for year two or year three. Thus, the Commission expects the cost over the three-year period will be \$100,000⁶ or \$33,333⁷ per year when annualized over three years, across all security-based swap counterparties that will make such representations. The Commission expects the total labor cost per respondent will be approximately \$666.67⁸ when annualized over three years.

b. Representations regarding U.S.-person status

Pursuant to Rule 3a71-3(a)(4)(iv), persons may rely on representations from a counterparty that the counterparty does not satisfy the criteria defining U.S. person set forth in Rule 3a71-3(a)(4)(i), unless such person knows or has reason to know that the representation is not accurate. Commission staff has estimated, based on its understanding of OTC derivatives markets, including the domiciles of counterparties that are active in the market, that up to 2,400

(..continued)

⁵ The Commission staff estimates that this burden will consist of 10 hours of in-house counsel time for each security-based swap market participant that will make such representations. See Business Conduct Adopting Release, at 30097, note 1581.

⁶ 50 (estimated number of entities) * \$2,000 (cost of outside counsel) = \$100,000.

⁷ \$100,000 (total cost to seek outside counsel over three years) ÷ 3 years = \$33,333.33.

⁸ \$33,333 (total labor cost to seek outside counsel per year) ÷ 50 (estimated number of entities that will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3(a)(3)(ii)) = \$666.67.

entities will provide representations that they do not meet the criteria necessary to be U.S. persons.

As with representations regarding whether a transaction is conducted through a foreign branch, the Commission estimates the maximum total third-party disclosure burden associated with developing new representations will be, for each counterparty that will make such representations, no more than five hours and up to \$2,000 for the services of outside professionals, for a maximum of approximately 12,000 hours or 4,000 hours per year when annualized over three years, across all security-based swap counterparties that will make such representations. This estimate assumes little or no reliance on standardized disclosure language.

The Commission expects that the majority of the burden associated with the new disclosure requirements will be experienced during the first year as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the annual third-party disclosure burden associated with this requirement will be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 24,000 hours⁹ across all applicable security-based swap counterparties.

The Commission believes that some of the entities that will have to comply with Rule 3a71-3 will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission assumes that all 2,400 respondents will seek

⁹ 2,400 (total number of entities) * 10 hours = 24,000 hours

outside legal for the first year only and will, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also assumes that none of the 2,400 respondents will seek outside legal services for year two or year three. Thus, the Commission expects the cost over the three-year period will be \$4,800,000¹⁰ or \$1,600,000¹¹ per year when annualized over three years, across all security-based swap counterparties that will make such representations. The Commission expects the total labor cost per respondent will be approximately \$666.67¹² when annualized over three years.

Written comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

¹⁰ 2,400 (total number of entities) * \$2,000 = \$4,800,000.

¹¹ \$4,800,000 (total cost over three years) ÷ 3 years = \$1,600,000.

¹² \$1,600,000 (total labor cost to seek outside counsel per year) ÷ 2,400 (estimated number of entities that will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3(4)(iv)) = \$666.67.

Please direct your written comments to: Charles Riddle, Acting Director/Chief
Information Officer, Securities and Exchange Commission, c/o Candace Kenner, 100 F Street,
NE, Washington, DC 20549, or send an email to: PRA_Mailbox@sec.gov.

Dated: June 7, 2019.

Eduardo A. Aleman,
Deputy Secretary.

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